

STATE OF MICHIGAN
COURT OF APPEALS

In re Application of DETROIT EDISON
COMPANY to Increase Rates.

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and ENERGY MICHIGAN, INC.,

Appellees,

and

DETROIT EDISON COMPANY,

Petitioner-Appellee.

In re Application of DETROIT EDISON
COMPANY to Increase Rates.

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and MICHIGAN CABLE
TELECOMMUNICATIONS ASSOCIATION,

Appellees,

FOR PUBLICATION
April 10, 2012

No. 296374
Public Service Commission
LC No. 00-015768

Advance Sheets Version

No. 296379
Public Service Commission
LC No. 00-015768

and

Advance Sheets Version

DETROIT EDISON COMPANY,

Petitioner-Appellee.

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority that the Public Service Commission's decision to allow rate decoupling should be reversed because the issue is plainly controlled by the Legislature's recent adoption of MCL 460.1089(6) and MCL 460.1097(4). These sections set forth the scope of the commission's authority specifically with respect to rate decoupling and clearly limit that authority, regardless of what its scope was before their passage. Thus, the statutes determine the outcome of this issue, and the extent of the commission's general authority as it existed before the adoption of these controlling provisions is not relevant to our decision.

I dissent from the majority's reversal of the PSC's approval of the advanced metering infrastructure program. Because this is an experimental program and because the commission's action was not arbitrary or capricious, we are bound to affirm. The majority states that it "declines to adopt" the arbitrary-and-capricious standard of review with respect to PSC authorization of experimental programs. However, that is in fact the standard. *Residential Ratepayer Consortium v Pub Serv Comm*, 239 Mich App 1, 5; 607 NW2d 391 (1999). The majority does not conclude, and I do not believe we can conclude, that the PSC's approval of the pilot program was arbitrary and capricious in light of the testimony of Detroit Edison's manager of systems operations and that of the manager of the Energy Efficiency Section of the Electric Reliability Division of the commission. As noted in *Residential Ratepayer*, experimental rates "'by their very nature . . . must await results on a test basis'" *Id.* (citation omitted). I believe that the majority is putting the cart before the horse by requiring that the commission conduct a full hearing on the results of the experimental program before the program has been conducted.

Moreover, it is not disputed that this issue was raised in an earlier case involving these parties, decided in the PSC's favor and not pursued by appellants to a decision by this Court.¹ While the doctrines of res judicata and collateral estoppel do not apply "in the pure sense" in ratemaking cases, "issues fully decided in earlier PSC proceedings need not be 'completely relitigated' in later proceedings unless the party wishing to do so establishes by new evidence or

¹ See Public Service Commission Case No. U-15768, January 11, 2010, opinion and order, p 55, citing Public Service Commission Case No. U-15244, December 23, 2008, opinion and order, appeal dismissed by stipulation in *In re Application of Detroit Edison Co to Increase Rates*, unpublished order of the Court of Appeals, entered February 22, 2010 (Docket No. 291226).

a showing of changed circumstances that the earlier result is unreasonable.” *In re Application of Consumers Energy Co For Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010), quoting *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1, 9; 420 NW2d 156 (1988). As appellants identify no new evidence or changed circumstances, I would defer to the earlier ruling.

I concur with the majority in all other respects.

/s/Douglas B. Shapiro